

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (PHENTERMINE/ FENFLURAMINE/DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 1203
	:	
THIS DOCUMENT RELATES TO:	:	
	:	
MELISSA WALKER, et al.	:	
	:	
v.	:	
	:	
WYETH, et al.	:	CIVIL ACTION NO. 03-20566
	:	

**MEMORANDUM AND PRETRIAL ORDER NO.**

Bartle, C.J.

February 12, 2007

Before this court is the motion of defendant Wyeth Inc.<sup>1</sup> to enforce the Diet Drug Nationwide Class Action Settlement Agreement ("Settlement Agreement") against plaintiff Class Members Melissa Walker and Kevin Walker. The Settlement Agreement was approved by this court as part of our continuing jurisdiction over Multi-District Litigation No. 1203 involving the diet drugs Pondimin and Redux. See Pretrial Order ("PTO") No. 1415. Wyeth argues that Melissa and Kevin Walker have failed properly to opt out of the Settlement Agreement and are therefore barred under its terms from proceeding with their state court action against Wyeth. Plaintiffs argue excusable neglect.

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1. Effective March 11, 2002 American Home Products changed its name to Wyeth, Inc.

According to plaintiffs, Ms. Walker used the diet drugs Pondimin and Redux in 1996. In the summer of 2002 she began to experience health problems and sought medical attention. An echocardiogram performed on October 3, 2002 showed that there was damage to her aortic valve. Her doctors concluded that she needed valve replacement surgery.

On August 1, 2002, prior to her echocardiogram, Ms. Walker, with the help of her attorney, Robert M. Behlen, Esquire, submitted a completed Initial Opt-Out form,<sup>2</sup> commonly referred to as the Orange Form #1.<sup>3</sup> The deadline for submitting Orange Form #1, however, was March 30, 2000. PTO No. 997 at ¶ 19. Mr. Behlen maintains that his intention was to submit an Intermediate Opt-Out form, commonly referred to as Orange Form #2, but in error used Orange Form #1. Class Members who properly exercise an Intermediate Opt-Out may sue Wyeth for compensatory damages, subject to certain restrictions in the Settlement Agreement. See Settlement Agreement § IV.D.3.c. The deadline for submitting Orange Form #2 was May 3, 2003. Id. at § IV.D.3.b.

On March 27, 2003, plaintiffs filed suit against Wyeth in the District Court of Cleveland County, Oklahoma. Wyeth requested that plaintiffs amend their state court petition to

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2. Class Members who properly exercise an Initial Opt-Out "may initiate, continue with, or otherwise prosecute any legal claim" against Wyeth without being limited by the Settlement Agreement. Settlement Agreement § IV.D.2.c.

3. The various forms used in the course of implementing the Settlement Agreement are commonly identified by their color.

withdraw their claim for punitive damages, as required under the terms of the Settlement Agreement's Intermediate Opt-Out. A letter sent by Wyeth's attorneys to plaintiffs on July 18, 2003 shows that both parties were under the impression that Ms. Walker had exercised her Intermediate Opt-Out right. Pls.' Opp'n to Def.'s Mot. to Enforce, Ex. 2. The letter read, in part, "Our records reflect that your client, Melissa Walker has purported to exercise an Intermediate Opt-Out right." Id. (emphasis added).

Beginning in mid-2004, after the plaintiffs amended their petition to conform to the terms of the Intermediate Opt-Out, the parties proceeded with discovery. Written discovery requests were exchanged, numerous depositions were taken, and case specific expert reports were prepared and given to defendant. It was not until November 9, 2004 that Wyeth's attorneys wrote to Mr. Behlen informing him that plaintiffs' opt-out was invalid. Def. Mem., Ex. 8. The letter read, "We just determined that Ms. Walker's purported initial opt-out from the Nationwide Class Action Settlement was ineffective because it was over two years late." Id.

Plaintiffs concede that they did not properly effect an Intermediate Opt-Out of the Settlement Agreement by filing the Initial Opt-Out form. The Notice of Final Judicial Approval of the Settlement Agreement contained extensive instructions regarding the requirements to file an Intermediate Opt-Out. The Notice, which requires the submission of Orange Form #2, read:

To exercise an Intermediate Opt-Out right, an otherwise eligible Diet Drug User (or Representative Claimant of a Diet Drug User) must complete and sign the ORANGE Form #2 that is included with this Notice. The Class Member exercising the opt-out must mail the original of the signed ORANGE Form #2 to the Trust and mail a copy of it to AHP, as instructed in the ORANGE Form #2. *Both mailings must be postmarked no later than May 3, 2003.*

Official Notice of Final Judicial Approval at 15.

However, the deadlines imposed by the Settlement Agreement may be extended if a party can show his or her failure to meet the deadlines was due to "excusable neglect."<sup>4</sup> In In re Orthopedic Bone Screw Prods. Liab. Litig., 246 F.3d 315, 323 (3d Cir. 2001), our Court of Appeals reiterated the Supreme Court's analysis of excusable neglect as set forth in Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship., 507 U.S. 380 (1993). Four factors should be evaluated when deciding whether excusable neglect exists: (1) the danger of prejudice to the non-movant; (2) the length of the delay and its potential effect on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. Pioneer, 507 U.S. at 395; Bone Screw, 246 F.3d at 322-23. We will address each of these factors in turn.

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4. Plaintiffs have not filed a motion seeking an extension of the Intermediate Opt-Out deadline but have asked the court to grant such an extension in light of Wyeth's motion to enforce the Settlement Agreement.

The danger of prejudice to Wyeth is minimal. There is no substantive difference between Orange Form #1 and Orange Form #2. Wyeth was therefore not deprived of any information about Ms. Walker or her claim by receiving Orange Form #1 instead of Orange Form #2. If we deny Wyeth's motion and allow Ms. Walker to proceed as an Intermediate Opt-Out, Wyeth, of course, will have to litigate this case and incur the related expenses. Nonetheless, the parties have already taken substantial steps toward that end and Wyeth has, up to this point, fully expected it to proceed. The absence of Orange Form #2 was obvious from the beginning, but Wyeth did nothing about it for almost twenty months after the lawsuit was instituted. This is not a situation where Wyeth was suddenly forced to defend against a claim unbeknownst to it and years after the fact.

Moreover, there has been no delay and no adverse effect on judicial proceedings because of plaintiffs' failure to file Orange Form #2. The Orange Form #1 was submitted during the time period allowed for Orange Form #2. The lawsuit against Wyeth was filed in March 2003, and no delay has occurred because of the absence of Orange Form #2. Indeed, all have treated Orange Form #1 as the trigger for a timely Intermediate Opt-Out until Wyeth discovered the error on November 9, 2004, which, as noted above, was almost twenty months after the lawsuit was filed. It is now much too late for Wyeth to cry foul.

In the broader context of the Settlement Agreement, we have no reason to believe that finding excusable neglect in this

instance will open the flood gates to other Class Members seeking to exercise an Intermediate Opt-Out. The circumstances presented here are unusual, if not unique.

"[C]lients must be held accountable for the acts and omissions of their attorneys." Pioneer, 507 U.S. at 396. Mr. Behlen's admission that it was his error that caused plaintiffs to submit Orange Form #1 instead of Orange Form #2 would normally not be sufficient to find excusable neglect. Mr. Behlen's mistake, however, seems to be nothing more than a clerical error—an error which was obvious on its face and about which Wyeth did nothing for close to two years. No prejudice has occurred to Wyeth, and no delay has occurred. Furthermore, we find plaintiffs and Mr. Behlen acted in good faith to exercise the Walkers' Intermediate Opt-Out right.

Accordingly, plaintiffs' failure to file Orange Form #2 to meet the Intermediate Opt-Out deadline was due to excusable neglect, and the motion of Wyeth to enforce the Settlement Agreement will be denied.

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MELISSA WALKER, et al.	:	
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v.	:	
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	:	

**PRETRIAL ORDER NO.**

AND NOW, on this 12th day of February, 2007, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) defendant's motion to enforce the Settlement Agreement and PTO No. 1415 against Class Member Melissa Walker and derivative claimant Kevin Walker is DENIED; and

(2) plaintiffs shall have 30 days from this Order to submit the proper Intermediate Opt-Out form in accordance with the Settlement Agreement.

BY THE COURT:

/s/ Harvey Bartle III

C.J.